United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2630

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2630

B

P/S

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC.; BRUCE E. RAPKINE; and SAMUEL RAPKINE,

Plaintiffs-Appellants,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE; LEONARD T. CHAPMAN, Commissioner, Immigration and Naturalization Service, in his official and personal capacity; JAMES T. GREENE, Deputy Commissioner, Immigration and Naturalization Service, in his official and personal capacity; NORTHEAST REGIONAL OFFICE, IMMIGRATION AND NATURALIZATION SERVICE; SOCRATES P. ZOLOTAS, Regional Commissioner, Northeast Regional Office, Immigration and Naturalization Service, in his official and personal capacity; DISTRICT #3, NEW YORK CITY DISTRICT OFFICE, IMMIGRATION AND NATURALIZATION SERVICE; SOL MARKS, District Director, District # 3, New York City District Office, Immigration and Naturalization Service, retired, in his official and personal capacity; JOHN DOE, District Director, District # 3, New York City District Office, Immigration and Naturalization Service, in his official and personal capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Statement of the Issues

1. Whether the court below was correct in holding that the designation of facilities to conduct medical examinations of aliens does not deny due process and equal protection to appellants.

2. Whether the court below was correct in holding that the promulgation and implementation of 8 C.F.R. § 234.2 was not invalid for lack of publication.

Statement of the Case

This is an appeal from an order and judgment of the Honorable Kevin T. Duffy, United States District Judge for the Southern District of New York. On October 23, 1974 Judge Duffy entered an order denying appellants' motion for a preliminary injunction in accordance with his opinion of the same date (21-A).[1]

On July 1, 1974 appellants instituted this action in the United States District Court for the District of Vermont. On July 10, 1974 an order was entered transferring the action to the Southern District of New York. Appellants sought a declaratory judgment declaring that appellees' actions in designating certain civil surgeons and laboratory facilities employing civil surgeons to conduct medical examinations of aliens seeking permanent residence status under Section 245 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1255, to be unlawful and violative of appellants' right to due process and equal protection and to be invalid for failure to publish in accordance with 5 U.S.C. § 553(b). Appellants further sought a preliminary and permanent injunction requiring defendants to treat as void the provisions of 8 C.F.R.

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[1] References followed by the letter "A" refer to pages in the Plaintiffs-Appellants' Appendix, attached to their brief.

§ 234.2(b), to treat as void the list of designated facilities and to give appellants an opportunity to compete for a place on the list. Alternatively, appellants sought an order directing appellees to include appellant laboratory on the list of designated facilities.

The Court below denied appellants' motion for a preliminary injunction on the ground that appellants had failed to demonstrate either probable success on the merits or that appellants had failed to show the existence of a sufficiently serious question on the merits.

Statement of Facts

Under procedures in effect prior to August 1, 1973, the medical examination of an alien residing in the New York District of the Immigration and Naturalization Service (the "Service"), who was seeking status as a permanent resident of the United States, was performed by medical officers of the United States Public Health Service ("Public Health"). The alien had required X-rays taken and a serology test performed by a physician or laboratory of his choice and when the alien appeared for a medical examination by Public Health medical officers, he presented to the examining officer the X-ray film, a physician's report interpreting the X-ray and the results of the serology test.

Sometime prior to August 1, 1973, Public Health advised the Service that Public Health could no longer perform the medical examination of aliens because of reduced manpower and facilities. Consequently, since August 1, 1973 the medical examination of aliens is being conducted solely by qualified civil surgeons and clinics employing qualified civil surgeons designated by the District Director of the New York District.

In designating physicians or clinics to perform the medical examination, the District Director was guided by the needs of the Service and the interests of the aliens. For administrative purposes, especially the need to keep designated physicians and clinics abreast of all changes in regulations and procedures and the need to monitor medical examinations, the Service requested that the various district directors designate as few physicians or clinics as possible, consistent with the needs of the Service. In the interest of the aliens, attempts were made to designate medical facilities which are geographically convenient; which are capable of performing X-ray and serological tests as well as the actual medical examination of the alien; which have equipment capable of producing the X-ray film and serological test results rapidly so that, to the extent possible, the X-ray serological test and medical examination could be performed during a single visit of the alien to the medical facility; which have a suitable capacity to accommodate a sizable number of aliens appearing for medical examination; and which have a staff large enough so that requisite medical personnel will be available on a year-round basis to perform the necessary tests and examinations, regardless of vacation or sickness of members of the staff. It is also in the interest of the Service, in order to prevent fraudulent substitutions, to have the X-ray, serological test and medical examination performed by the same facility.

The District Director of the Service at New York designated a number of medical facilities in accordance with the foregoing considerations. The number designated appears adequate, at present, to serve the needs of the district. The designation of facilities was left to the discretion of the District Director in accordance with the provisions of 8 C.F.R. § 234.2(b). Under the direction of the District Director of the New York District, numerous calls were made to the New York State Medical Society, county medical directors, hospitals, private laboratories and medical

groups. After reviewing the qualifications of all physicians, clinics, laboratories, and medical groups, the District Director designated a minimum number of facilities within his district. The selected facilities have been providing satisfactory service to the aliens and to the Service.

Relevant Statutes

Immigration and Nationality Act, 66 Stat. 1163 (1952), as amended:

Section 245, 8 U.S.C. § 1255

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe. . . .
>
> • • • • •

Relevant Regulations

8 C.F.R. § 245.6 Medical examination.

> Upon acceptance of an application [for adjustment of status under Section 245 of the Act], the applicant shall be required to submit to an examination by a medical officer of the United States Public Health Service, or by a designated civil surgeon, whose report setting forth the findings of the mental and physical condition of the applicant shall be incorporated into the record. • • •

8 C.F.R. § 234.2 Examination in the United States of alien applicants for benefits under the immigration laws.

Text of regulation in effect on August 1, 1973

(a) *General.* When a medical examination is required of an alien who files an application for a benefit under the immigration laws, it shall be made by a medical officer of the U.S. Public Health Service, or by a civil surgeon if a medical officer of the U.S. Public Health Service is not located within a reasonable distance. The examination will be performed in accordance with the instructions and regulations contained in the "Manual for Medical Examination of Aliens."

(b) *Selection of civil surgeons.* When a civil surgeon is to perform the examination, he shall be selected by the district director having jurisdiction over the area of the alien's residence. The district director shall select as many civil surgeons as he determines to be necessary to serve the needs of the Service in a locality under his jurisdiction. The civil surgeon selected shall be a licensed physician with no less than 4 years professional experience. Officers of county medical societies shall be consulted to obtain the names of competent surgeons willing to make the examinations. An understanding saall be reached with respect to the fee which the surgeon will charge for the examination. The alien shall pay the fee agreed upon direcetly to the surgeon making the examination.

* * * * *

Text of Regulation as effective November 30, 1973

(a) *General.* When a medical examination is required of an alien who files an application for status as a permanent resident under section 245 of the Act or Part 245 of this Chapter it shall be made by a selected civil surgeon. Such examination shall be performed in accordance with 42 CFR Part 34 and

any additional instructions and guidelines as may be considered necessary by the U.S. Public Health Service. In any other case in which the Service requests a medical examination of an alien the examination shall be made by a medical officer of the U.S. Public Health Service or by a civil surgeon if a medical officer of the U.S. Public Health Service is not located within a reasonable distance or is otherwise not available.

(b) *Selection of civil surgeons.* When a civil surgeon is to perform the examination, he shall be selected by the district director having jurisdiction over the area of the alien's residence. The district director shall select as many civil surgeons, including clinics employing qualified civil surgeons, as he determines to be necessary to serve the needs of the Service in a locality under his jurisdiction. Each civil surgeon shall be a licensed physician with no less than 4 years professonal experience. Officers of local health departments and medical societies may be consulted to obtain the names of competent surgeons and clinics willing to make the examinations. An understanding shall be reached with respect to the fee which the surgeon or clinic will charge for the examination. The alien shall pay the fee agreed upon directly to the surgeon making the examination.

* * * * *

ARGUMENT

POINT I

The Court below was correct in holding that the Service regulation, 8 C.F.R. § 234.2, is not void for lack of publication.

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, contains certain specific provisions governing agency action. It requires, *inter alia*, publication in the Federal Register of notice of proposed rule-making and an opportunity to submit written data, views or arguments by interested persons. 5 U.S.C. §§ 553(b) and (c). Publication of a substantive rule shall be made not less than 30 days prior to its effective date. 5 U.S.C. § 553(d). Matters relating to agency management are excepted from the statute, 5 U.S.C. § 553(a)(2), and interpretive rules, statements of policy and rules of agency procedure or practice are excepted from the publication requirement. 5 U.S.C. § 553(b)(A). A rule is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency. . . ." 5 U.S.C. § 551(4).

It is the position of the appellees that the Service, in promulgating the regulation in question, 8 C.F.R. § 234.2, and that the other appellees, in implementing such regulation, were not involved in rulemaking within the meaning of the Administrative Procedure Act. Whether the medical examination of aliens is conducted by Public Health officers or by civil surgeons does not affect the substantive statutory requirement that all aliens applying for adjustment of status must undergo a medical examination. 8 U.S.C. § 1255; 8 C.F.R. § 245.6. Civil surgeons rather than Public

Health officers now conduct the required medical examination simply because Public Health has determined that it can no longer handle the large number of aliens seeking medical examinations. The selection and utilization of civil surgeons to conduct medical examinations did not seek to implement, interpret or prescribe law or policy. Accordingly, the promulgation of the regulation, and any list of designated civil surgeons compiled pursuant thereto, is not a "rule" as that term is defined in 5 U.S.C. § 551(4) and, therefore, not subject to the rule-making procedures set forth in 5 U.S.C. § 553.

In making a determination as to whether agency directives are substantive rules requiring publication courts have frequently looked to the so-called "impact test". See *Noel* v. *Chapman*, 508 F.2d 1023 (2d Cir. 1975); *Lewis-Mota* v. *Secretary of Labor*, 337 F. Supp. 1281 (S.D.N.Y. 1972), *rev'd on other grounds*, 469 F.2d 478 (2d Cir. 1972); *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740 (3d Cir. 1969); *Pharmaceutical Manufacturers Association* v. *Finch*, 307 F. Supp. 858 (D. Del. 1970). Briefly stated, the impact test requires that the impact involved be substantial and involve new rights and obligations. As set forth in *Lewis-Mota, supra*, the test requires that a reviewing court look to what the policy in fact did. If the policy has had a "substantial impact" then it must be published and such "substantial impact" would be present if the regulation had the effect of changing existing rights and obligations.

The District Court found that the regulation is not void for lack of publication since the regulation clearly relates to agency procedure and does not change existing rights and obligations. The statute which imposed the obligation of having a medical examination on the aliens is found at Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, and in 8 C.F.R. § 245.6. Prior to the publica-

tion of November 30, 1973 an alien had the obligation of submitting to a medical examination by Public Health Service officers. Subsequent to November 30, 1973 the alien still had the obligation of submitting to a medical examination, although the person conducting the examination would now be a civil surgeon instead of a Public Health Service officer. This class upon whom the regulation conferred an obligation, both prior to November 30, 1973 and subsequent thereto, was the class of aliens who sought adjustment of status. But the obligation imposed on such class was in no way changed by the amended regulation of November 30, 1973. The only change made was in the person conducting the medical examination.

Appellants cite *Blackwell College of Business* v. *Attorney General*, 454 F.2d 928 (D.C. Cir. 1971) for the proposition that "if a federal agency . . . implements a rule which regulates a complainant's ability to conduct its business, then that agency must comply with the Administrative Procedure Act." Such a contention indicates a complete disregard of the clear distinction between the procedures set forth in the Act and regulations with respect to the approval of schools by the Attorney General for attendance by non-immigrant foreign students and the regulation in question here. See Sec. 101(a)(15)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(F).

Appellants stand in a totally different position than did the *Blackwell College of Business*. The former was never on any list of facilities approved by the Service to perform laboratory tests. In fact, no such list ever existed. Blackwell College, on the other hand, had applied for and had been granted approval as a school authorized for attendance by non-immigrant students. The Service's revocation of such approval of Blackwell College was found not to have complied with the provisions of the Administrative

Procedure Act, although not the publication provisions of that Act as appellants would have the Court believe. Likewise in *Pharmaceutical Mfrs. Assoc.* v. *Finch, supra,* the complainants, a group of drug manufacturers, had been regulated by a government agency, again unlike appellants in this case.

Appellants contend that the designation of a list of approved facilities constitutes a license within the meaning of 5 U.S.C. § 551(8) and that the Service was required to comply with the provisions of 5 U.S.C. §§ 556 and 557 in deciding which clinics would receive approval. However, 5 U.S.C. §§ 556 and 557 specify that the procedures set forth in those sections apply only when a hearing is required by 5 U.S.C. §§ 553 or 554. In turn 5 U.S.C. §§ 553 and 554 specify that a hearing on record shall be made only when "required by statute." Appellants reliance on 5 U.S.C. § 558 is misplaced since that statute provides for hearing procedures only in connection with an application for a license required by law. Contrary to appellants' contention there was no formal "application" made by any of the designated facilities. There is no statute or regulation which requires such an application. Under the terms of the regulation the designation of facilities approved for medical examinations is a discretionary function of the District Director.[2]

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[2] Appellants contend that the absence of a record upon which the Service based its selection is violative of 5 U.S.C., §§ 556 and 557. Although it is appellees' position that those statutes are not applicable, we would point out that appellants are erroneously assuming that such a record does not exist. Although the record in the District Court is very incomplete since plaintiff sought no discovery, the Service does have an extensive record of the procedures utilized and the material facts relied upon in designating certain facilities.

POINT II

The Regulation and selection made thereunder do not deprive appellants of equal protection or due process.

Appellants contend that the promulgation of 8 C.F.R. § 234.2 and the compilation of a list of designated facilities by the appellees pursuant to the regulation violates appellants' right to due process and equal protection. Such contention is based on appellants' allegation that appellees have revoked what would amount to a "license" granted to the appellants by the appellees. Appellants contend that for a twenty-five year period the appellant laboratory performed X-ray and serological examinations for aliens who were then medically examined by Public Health Service officers. At no time prior to establishment of the present list did either the Public Health Service or the appellees maintain a list of facilities designated to conduct the laboratory tests required of aliens. There was no direct referral by any government agency, and certainly not by appellees, of aliens to appellant laboratory.

In raising an equal protection issue, appellants must show the existence of some right which is adversely affected or impinged upon. *Boraas* v. *The Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, — U.S. —, 39 L. Ed. 2d 797 (1974). In this case, however, the appellants can point to no such right, fundamental or otherwise, which is adversely affected by the policy. Thus, in our view there can be no equal protection issue in this case.

The only possible right which appellant can allege is a right to be permitted to continue conducting medical examinations of aliens. In fact, appellants never did conduct medical examinations; the only function of appellant laboratory was to perform laboratory tests. Under the statute, 8 U.S.C. § 1124, medical examinations of aliens have always

been performed by Public Health Service officers or by selected civil surgeons. Appellants had no right under either the statute or the regulation in effect prior to November 30, 1973 or the procedure in effect prior to August 1, 1973 to conduct X-ray or serological tests for aliens.

Appellants' contention that they have been deprived of a "license" to conduct medical examinations of aliens is without merit. In fact, neither appellant laboratory nor any other physician or laboratory has ever been granted a "license" to perform such examinations for the simple reason that a license is not required by any law or regulation. Since appellants were never granted a license, their contention that they were deprived of this alleged property right cannot be sustained.[3]

Furthermore, both the statute and the regulation, current and former, provide that a civil surgeon who is selected to conduct medical examinations of aliens must have at least four years professional experience. The current regulation provides that the District Director may select a clinic employing a qualified civil surgeon to conduct medical examinations. Appellants do not contend that such requirement is violative of due process or equal protection. Rather, they contend that appellant laboratory "is identical

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[3] The appellants here are not and have never been contractors for the Service or for Public Health, nor do they fall into the classification of unsuccessful bidders for government work. Even in that situation this Circuit has held that no private rights are conferred on a bidder, who therefore has no standing to challenge the award of a bid to another. *Adelman* v. *Federal Housing Authority*, 382 F.2d 594, 597 (2d Cir. 1967). The District of Columbia Circuit has limited standing under the Administrative Procedure Act for an unsuccessful bidder to situations where there is an "exceptional showing" of a violation of a clear command of the law, where no state of facts would justify the administrative action. *Wheelabrator Corp.* v. *Chafee*, 455 F.2d 1306 (D.C. Cir. 1971).

to clinics in the Service's approved class or New York X-ray meets higher standards of qualifications than approved clinics." (Appellants' brief, p. 23). Again appellants assume facts not in the record and instead, totally disregard the fact that in their own complaint appellants admit that appellant laboratory does not have a qualified civil surgeon on its staff. (Complaint, para. 18).

In *United States* v. *Husband R.* (*Roach*), 453 F.2d 1054 (5th Cir. 1971), the appellant, a non-franchised bus operator, contended that a newly-enacted regulation which restricted operation of non-franchised buses in the Canal Zone, so that a franchised company would have almost exclusive access to several areas, was an illegal discrimination against non-franchised bus operators and did not meet the requirements of substantive due process. The Court found, however, that the mere impingement by an intervening reasonable regulation upon the appellant's previously unencumbered freedom to operate his bus over the newly prescribed route does not in and of itself make a case of illegal discrimination. *See Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

The appellant in that case, like appellants here, claimed that he had obtained a property interest by virtue of his long and uninterrupted use and that his operation of a bus for a long period of time without a franchise or permit estopped the Canal Zone government from requiring him to comply with a regulation limiting his rights to operate his bus. In response to that contention of appellant, the court stated:

> "We need not pause over the argument whether appellant is possessed of some kind of property interest acquired by estoppel. Whether a particular constitutional protection attaches depends upon the relative weight of the private interest affected and the governmental function involved, and not upon assignment of meaning to the word 'property.' *Cafeteria and Restaurant Workers Union, etc.* v. *McElroy*, 367 U.S. 886 (1961)." *Id.* at 1002.

Appellants acquired and utilized their alleged interest at the discretion of the appellees, who have now used that same discretion to protect vital governmental interests in the proper medical examinations of aliens seeking adjustment of status to that of a lawful permanent resident. While the effect of the Government action may be to deprive appellants of access to aliens as clients in the operation of appellant laboratory and may cause economic hardship to appellants, just as it may undoubtedly affect others, it does not deny appellants the right to pursue their occupation and it does not deprive them "of the very means by which to live." *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Even should we assume, *arguendo*, that appellants could point to some right being impinged upon by the regulation and its implementation, they still could not show a violation of their right to equal protection. The classification created by the regulation is nonetheless valid because it is supported by a rational basis and is in fact substantially related to a lawful objective. *Cf. Boraas* v. *The Village of Belle Terre*, *supra*; *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Aguayo* v. *Richardson*, 473 F.2d 1090 (2d Cir. 1973).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

PAULINE P. TROIA, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 4th day of April 19 75 she served a copy of the within

govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Thomas & Alexander, Esqs.,
47 Clarke St.
Brulington Va. 05401

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

4th day of April 19 75

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977